

HARDY SALT CO.

IBLA 85-525

Decided February 27, 1987

Appeal from a decision of the Montana State Office, Bureau of Land Management, affirming issuance of notices of incidents of noncompliance and assessment of liquidated damages. TPR-M-920-4.

Affirmed in part; vacated in part.

1. Bureau of Land Management -- Oil and Gas Leases: Civil Assessments and Penalties

The Bureau of Land Management may properly cite an oil and gas lessee for an incident of noncompliance with regulatory requirements upon a showing of a failure to effectively seal valves as required by 43 CFR 3162.7-4(b)(1).

2. Oil and Gas Leases: Civil Assessments and Penalties -- Regulations: Interpretation

An assessment for failure to seal appropriate valves levied pursuant to 43 CFR 3163.3(j) may be vacated by the Board in view of the suspension of that regulation by the Bureau of Land Management and the change in Department policy regarding automatic assessments.

APPEARANCES: Paul D. Christiansen, Field Manager, Hardy Salt Company Oil Division, Williston, North Dakota, for appellant.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

The Hardy Salt Company has appealed from a decision of the Montana State Office, Bureau of Land Management (BLM), dated March 21, 1985, affirming the issuance of two notices of incidents of noncompliance (INC) and the assessment of liquidated damages for violations of "minimum site security requirements."

On March 7, 1985, the Dickinson District Office, North Dakota, BLM, issued two INC's for violations at the Hardy Nelson No. 1 well site situated in the SW 1/4 NW 1/4 sec. 17, T. 154 N., R. 100 W., fifth principal meridian, Williams County, North Dakota. BLM cited appellant for failure to seal "open plug valve on inlet header in treator closed" and "bull plugs on recycle (tank outlets) at back of all 3 tanks," as required by 43 CFR 3162.7-4. BLM required compliance within 5 days and assessed appellant \$ 250 for each violation pursuant to 43 CFR 3163.3(j).

On March 18, 1985, appellant filed a request for a technical and procedural review pursuant to 43 CFR 3165.3. Appellant argued that it should not have been assessed a penalty because the amount of the assessment was disproportionate to the amount of production from the well, causing an undue hardship for the working interest owners; no losses of oil through theft had occurred; and BLM had not previously cited the violations for 3-1/2 years. Appellant stated that in the past a specified time period had been allotted to correct a violation before assessment of a penalty.

In its March 1985 decision, BLM concluded that the district office had been "technically and procedurally correct" in issuing the INC's and assessing liquidated damages:

43 CFR 3162.7-4(b-1), Minimum Standards, requires that "all appropriate valves on lines entering or leaving oil storage tanks shall be effectively sealed during the production and during the sales phase." Further, ". . . the piping and connections in an open system shall be protected." An open system is defined as "a piping arrangement from one or more source points to one or more other points in a system which does have a means of access; i.e., flat plugs, bullplugs, blanking caps, open-ended valves, or combinations thereof."

INC A321182 is correct in that the open-ended valve on the header is an access point which requires protection from undocumented or unauthorized entry.

INC A321183 is also correct in that the bullplugs on the lease tank recycle lines are access points which require protection from undocumented or unauthorized entry.

In its statement of reasons for appeal, appellant requests elimination or reduction of the assessments, again citing the undue hardship to working interest owners ^{1/} and the fact that BLM had previously specified a time for compliance before assessing a penalty. Appellant stated the cited violations were corrected within one day of issuance of the INC's.

The applicable regulation, 43 CFR 3162.7-4(b)(1), requires an operator to effectively seal "[a]ll appropriate valves on lines entering or leaving oil storage tanks" during the production and sales phase of operations. The regulation also indicates that this requirement only applies to an "open system," i.e. where there is a "means of access" in the system under the definition of that system in 43 CFR 3162.7-4(a). See 43 CFR 3162.7-4(b)(1). Appropriate valves are defined in 43 CFR 3162.7-4(a) as those "valves in a particular piping system, i.e., fill lines, equalizer lines, sales lines, circulating lines, drain lines, or other lines, that must be sealed during a given phase of operations."

^{1/} Appellant explains that the well averages 2.6 barrels of oil per day thereby resulting in a net profit of approximately \$ 1.15 per day: "The combination of low production rate coupled with the operating costs means that the working interest holders will have to forego all profit for 167 days just to pay the \$ 500 fine."

Where an operator fails to comply with any of the regulations in 43 CFR Part 3160, BLM is authorized to assess liquidated damages. 43 CFR 3163.1. In the case of "failure to maintain effective seals required by the regulations in [43 CFR Part 3160]," the amount of liquidated damages for each INC is set, as a matter of regulation, at \$ 250. 43 CFR 3163.3(j).

[1] Regulation 43 CFR 3163.1 authorizes BLM officers to assess liquidated damages in specific instances of noncompliance. A finding of violation and a levy of assessment are two separate determinations made pursuant to different regulations. Mingo Oil Producers, 94 IBLA 384, 388 (1986). From our review of the record, we are satisfied that BLM did not err in finding the subject violations of Departmental minimum site security requirements for failure to effectively seal valves.

[2] However, on March 22, 1985, BLM in part suspended the use of assessments for incidents of noncompliance under 43 CFR 3163.3(j), pursuant to notice published in the Federal Register (50 FR 11517 (Mar. 22, 1985)). See also Instruction Memoranda (IM) Nos. 85-384 and 84-594, Change 4, each dated Apr. 16, 1985. In addition, the proposed rules published January 30, 1986, in the Federal Register, as explained in the preamble, eliminate automatic assessments for incidents of noncompliance under 43 CFR 3163.3(j). 51 FR 3887 (Jan. 30, 1986). Instead, under the proposed rules, an operator cited with a failure to maintain effective seals required by regulation would be given a specified time to comply with a written order before being assessed liquidated damages. See 43 CFR 3163.3(b) (51 FR 3889 (Jan 30, 1986)). We believe this new approach by BLM is fair to all parties. Moreover, these actions indicate a shift in Departmental policy regarding the automatic assessment of liquidated damages. Compare with IM No. 84-594, dated July 12, 1984. In the absence of any countervailing public policy considerations or intervening rights, appellant is entitled to the benefit of that change in Departmental policy. Mingo Oil Producers, *supra*; Davis Oil Co., 94 IBLA 325 (1986); Balcron Oil Co., 94 IBLA 71 (1986); Benson-Montin-Greer Drilling Corp., 92 IBLA 92 (1986); Yates Petroleum Corp., 91 IBLA 252 (1986); Somont Oil Co., 91 IBLA 137 (1986).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part and vacated in part.

Wm. Philip Horton
Chief Administrative Judge

We concur:

Kathryn A. Lynn
Administrative Judge
Alternate Member

Bruce R. Harris
Administrative Judge